Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-50–07 OF 2018 (P)
TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), IDRUS HARUN AND NALLINI PATHMANTHAN FCJJ
17 FEBRUARY 2020

Companies and Corporations — Liquidators — Action against liquidator — Application for leave to file action against liquidator of another company in liquidator's personal capacity — Whether party who was neither a creditor nor a contributory of a wound up company entitled to obtain leave to sue liquidator of the wound up company, in his personal capacity — Whether liquidator merely agent and acting on behalf of wound up company — Whether liquidator personally liable — Whether liquidator abused his office or committed misfeasance — Whether applicant sought to initiate action against wrong party — Whether Court of Appeal erred in extending liquidator's personal liability — Companies Act 1965 s 236(2)(c)

Machang Indah Development Sdn Bhd (in liquidation) ('the respondent') had filed an application in the High Court seeking leave to proceed against the liquidator ('the appellant') of another company, one Merger Acceptance Sdn Bhd (in liquidation) ('Merger') in his personal capacity. The relevant facts were that Merger had created a third-party charge over a piece of land in favour of Bank Kerjasama Rakyat Malaysia ('Bank Rakyat') to enable financing to be granted to the respondent to develop the said land. The development project failed and consequently Bank Rakyat had made several attempts to auction the 124 unbuilt lots on the said land but to no avail. Subsequently, the appellant as the liquidator of Merger was able to sell the unbuilt lots for a price of RM9m but the respondent claimed that the unbuilt lots were sold at a gross undervalue. The proposed claim was for damages against the liquidator personally, by reason of an alleged breach of a joint venture agreement and/or power of attorney between the two companies in liquidation. The main issue was whether the appellant who was the liquidator of Merger was personally liable in damages to the respondent for an alleged breach of contract by Merger. Both the High Court and Court of Appeal found in favour of the respondent, hence the present appeal. The Federal Court granted leave in respect of the following question of law: 'Whether a party (such as the respondent/Machang

in the instant case) who is neither a creditor nor a contributory of a wound up company (such as Merger in the instant case ('the Wound-Up Company') is entitled to obtain leave to sue the liquidator of the Wound-Up Company, in his personal capacity, for losses allegedly suffered by the said party arising from an alleged breach of the joint venture agreement and/or power of attorney entered into between the said party (Machang) and the Wound-Up Company ('Merger')'.

Held, allowing the appeal with costs of RM40,000 to the appellant subject to allocatur:

(1) When the liquidator carried out his statutorily stipulated function of selling the lands, he did so on behalf of the company, in his capacity as agent of the company. As such, while the sale so effected was binding on the company, it was not and did not amount to an act by the liquidator personally. The consequence was that a third party, such as the respondent could not sue the liquidator for negligence, save for misfeasance or personal misconduct on his part. The liquidator owed no duties to Machang, which was neither a creditor nor contributory of Merger. Any allegation of selling at an undervalue, even if true, was available only to a creditor or contributory (see paras 64–65 & 69).

(2) Under s 236(2)(c) of the Companies Act 1965, the liquidator was empowered to sell immovable property of the company in liquidation via private contract. It was clear from the foregoing that the liquidator here was simply carrying out his duties in accordance with statute. Therefore, the liquidator could not be alleged to have abused his office, nor committed misfeasance by selling the lands (see para 67).

(3) The respondent's primary complaint of an alleged breach of contract was against Merger, as the other contracting party. As such, in seeking to obtain leave to proceed against the liquidator personally, the respondent was seeking to initiate an action against the wrong party. The learned High Court judge failed to appreciate that the respondent's claim was a claim by a third party with no locus standi, for a breach of contract, more properly levelled against the company in liquidation, rather than the liquidator. There was simply no merit in the claim because the claim was brought against the wrong party. The essential ingredients of the claim were simply not present (see paras 70, 72 & 81).

(4) The Court of Appeal erred in failing to consider or address the issue of the locus standi of the respondent to bring such an action against the liquidator personally. Further, the Court of Appeal went on to extend the liability of liquidators personally in negligence by allowing for such claims to be brought by any 'interested parties in the winding-up process'. Such a broad and undefined extension of personal liability was

unjustified as the Court of Appeal neglected or failed to provide any legal reasoning to substantiate it. The Court of Appeal had also failed to review the factual basis for the allegation of liability, and to that extent, fell into the same error as the High Court. As such it failed to recognise that the respondent was seeking to bring a contingent claim for damages premised on an alleged breach of contract against the liquidator, when it ought properly, if at all, to have been brought against Merger. Based on the reasons stated above, the question of law was answered in the negative (see paras 82–83).

[Bahasa Malaysia summary

Machang Indah Development Sdn Bhd (dalam likuidasi) ('responden') telah memfailkan permohonan di Mahkamah Tinggi untuk meneruskan tindakan terhadap pelikuidasi ('perayu') satu syarikat lain, Merger Acceptance Sdn Bhd (dalam likuidasi) ('Merger') dalam kapasiti peribadinya. Fakta yang relevan adalah bahawa Merger telah membuat cagaran pihak ketiga ke atas sebidang tanah kepada Bank Kerjasama Rakyat Malaysia ('Bank Rakyat') untuk membolehkan pembiayaan diberikan kepada responden untuk membangunkan tanah tersebut. Projek pembangunan tersebut gagal dan akibatnya Bank Rakyat telah melakukan beberapa usaha untuk melelong 124 lot yang belum dibina di atas tanah tersebut tetapi tidak berjaya. Setelah itu, perayu sebagai pelikuidasi Merger berjaya menjual lot-lot yang belum dibina tersebut dengan harga RM9 juta tetapi responden mendakwa bahawa lot-lot yang belum dibina tersebut dijual pada nilai kasar yang rendah. Tuntutan yang dicadangkan adalah untuk ganti rugi terhadap pelikuidasi secara peribadi di atas dakwaan pelanggaran perjanjian usaha sama dan/atau surat kuasa wakil antara kedua-dua syarikat dalam likuidasi. Isu utama adalah sama ada perayu yang merupakan pelikuidasi Merger secara peribadi bertanggungjawab terhadap ganti rugi kepada responden atas tuduhan pelanggaran kontrak oleh Merger. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan berpihak kepada responden, oleh itu rayuan semasa. Mahkamah Persekutuan memberikan kebenaran berkenaan dengan persoalan undang-undang berikut: 'Whether a party (such as the respondent/Machang in the instant case) who is neither a creditor nor a contributory of a wound up company (such as Merger in the instant case ('the Wound-Up Company') is entitled to obtain leave to sue the liquidator of the Wound-Up Company, in his personal capacity, for losses allegedly suffered by the said party arising from an alleged breach of the joint venture agreement and/or power of attorney entered into between the said party (Machang) and the Wound-Up Company ('Merger')'.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM40,000 kepada perayu tertakluk kepada alokatur:

(1) Apabila pelikuidasi menjalankan tugasnya yang ditetapkan oleh undang-undang untuk menjual tanah, dia melakukannya atas nama

syarikat, dengan kapasiti sebagai ejen syarikat. Oleh itu, walaupun penjualan yang dilakukan adalah mengikat syarikat, itu bukan dan tidak membawa kepada tindakan oleh pelikuidasi secara peribadi. Akibatnya ialah pihak ketiga, seperti responden tidak boleh mengambil tindakan terhadap pelikuidasi kerana kecuaian, kecuali kesalahan penyalahgunaan kuasa atau salah laku peribadi di pihaknya. Pelikuidasi tidak mempunyai apa-apa tanggungjawab terhadap Machang, yang bukan pemiutang atau pencarum bagi Merger. Apa-apa tuduhan menjual pada nilai rendah, walaupun benar, hanya tersedia untuk pemiutang atau pencarum (lihat perenggan 64–65 & 69).

(2) Di bawah s 236(2)(c) Akta Syarikat 1965, pelikuidasi diberi kuasa untuk menjual harta tak alih syarikat dalam likuidasi melalui kontrak persendirian. Berdasarkan peruntukan di atas, adalah jelas bahawa pelikuidasi di sini hanya menjalankan tugasnya bersesuaian dengan undang-undang. Oleh itu, pelikuidasi tidak boleh dituduh telah menyalahgunakan jawatannya, atau melakukan penyalahgunaan kuasa dengan menjual tanah tersebut (lihat perenggan 67).

(3) Aduan utama responden mengenai dakwaan pelanggaran kontrak adalah terhadap Merger, sebagai pihak satu lagi yang memasuki kontrak tersebut. Oleh itu, dalam usaha mendapatkan kebenaran untuk meneruskan tindakan terhadap pelikuidasi secara peribadi, responden berusaha untuk memulakan tindakan terhadap pihak yang salah. Hakim Mahkamah Tinggi yang bijaksana gagal memahami bahawa tuntutan responden adalah tuntutan pihak ketiga tanpa locus standi, bagi pelanggaran kontrak, yang sepatutnya difailkan terhadap syarikat dalam likuidasi, dan bukannya terhadap pelikuidasi. Tidak terdapat merit dalam tuntutan tersebut kerana tuntutan tersebut difailkan terhadap pihak yang salah. Keperluan-keperluan penting bagi tuntutan tersebut tidak dipenuhi (lihat perenggan 70, 72 & 81).

(4) Mahkamah Rayuan terkhilaf kerana tidak mempertimbangkan atau menangani isu locus standi responden untuk membawa tindakan sedemikian terhadap pelikuidasi secara peribadi. Selanjutnya, Mahkamah Rayuan terus memperluas tanggungjawab pelikuidasi secara peribadi dalam kecuaian dengan membenarkan tuntutan tersebut dibawa oleh mana-mana 'pihak yang berkepentingan dalam proses penggulungan'. Perluasan tanggungjawab peribadi yang luas dan tidak ditentukan ini tidak wajar kerana Mahkamah Rayuan mengabaikan atau gagal memberikan alasan undang-undang untuk membuktikannya. Mahkamah Rayuan juga gagal mengkaji dasar faktual atas tuduhan kebersalahan, dan dengan itu, telah melakukan kekhilafan yang sama dengan Mahkamah Tinggi. Oleh itu, Mahkamah Rayuan gagal menyedari bahawa responden berusaha untuk membawa tuntutan kontinjen untuk ganti rugi yang didasarkan pada dakwaan pelanggaran

kontrak terhadap pelikuidasi, dimana sepatutnya, jika ada pun, tindakan tersebut difailkan terhadap Merger. Berdasarkan alasan-alasan yang dinyatakan di atas, persoalan undang-undang tersebut dijawab secara negatif (lihat perenggan 82–83).]

Cases referred to

Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor [2007] 3 MLJ 571; [2007] 7 CLJ 516, HC (refd)
Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1976] AC 167, HL (refd)
Berkeley Applegate (Investment Consultants) Ltd, Re, Harris v Conway [1988] 3 WLR 95, Ch D (refd)
Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204; [1995] 4 CLJ 11, CA (refd)
Chin Cheen Foh v Ong Tee Chew [2003] 3 MLJ 57; [2003] 2 CLJ 575, HC (refd)
Deloitte & Touche AG v Johnson [1999] 1 WLR 1605, PC (refd)
Knowles v Scott [1891] 1 Ch 717, Ch D (refd)
Mahomed and another v Morris and others [2000] 2 BCLC 536, Ch D (refd)
Mamone and Another v Pantzer (2001) 36 ACSR 743, SC (refd)
Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (refd)
Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd [2005] 2 MLJ 74; [2004] 8 CLJ 584, HC (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [2010] 1 MLJ 547, HC (refd)
TN Metal Industries Sdn Bhd v Ng Pyak Yeow [1995] 1 LNS 320, HC (refd)
Vernon Lloyd-Owen v Alfred E Bull & Ors [1936] 1 DLR 433, PC (refd)

Legislation referred to

Companies Act 1862 [UK]
Companies Act 1965 ss 236, 236(2)(c), (3)
Companies Law (1995) Revision [UK] s 106, 106(1)

Appeal from: Civil Appeal No P-02(IM)-843–04 of 2017 (Court of Appeal, Putrajaya)

Kirubakaran (Desmond Ng Keen Leong and Cheyenne Chan Pui See with him) (Shui-Tai) for the appellant.
Bastian Vendargon (S Raven and Siti Nur Amirah Aqilah bt Adzman with him) (S Ravenesan) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] This appeal relates to the law applicable to the grant of leave for the commencement of proceedings against a liquidator in his personal capacity. Although the law in this area is settled, this judgment is necessary to restate the principles of law in this area of insolvency, in view of the decisions of the Court of Appeal and the High Court, which run contrary to the established position under company and insolvency law.

[2] One Machang Indah Development Sdn Bhd (in liquidation) ('Machang') filed an application in the High Court seeking leave to proceed against the liquidator of another company, one Merger Acceptance Sdn Bhd (in liquidation) ('Merger') in his personal capacity. The basis for the application was that the applicant Machang had allegedly suffered losses by reason of a claimed breach of a joint venture agreement and/or power of attorney entered into between itself and Merger. In short, the proposed claim was for damages against the liquidator personally, by reason of an alleged breach of contract between the two companies in liquidation.

[3] The primary issue therefore was whether the liquidator of Merger, Tee Siew Kai who was also the appellant before us ('the liquidator'), was personally liable in damages to Machang for an alleged breach of contract by Merger.

[4] The High Court granted leave for Machang to proceed against the liquidator in his personal capacity. The Court of Appeal upheld the decision of the High Court. Leave was granted by this court in respect of the following sole question of law:

> *Whether a party* (such as the Respondent/Machang in the instant case) *who is neither a creditor nor a contributory of a wound up company* (such as Merger in the instant case ('the Wound-Up Company') *is entitled to obtain leave to sue the liquidator of the Wound-Up Company, in his personal capacity, for losses allegedly suffered by the said party arising from an alleged breach of the joint venture agreement and/or power of attorney entered into between the said party (Machang) and the Wound-Up Company ('Merger').* (Emphasis added.)

[5] We heard this appeal on 14 August 2019 and unanimously allowed it with costs, answering the question of law in the negative. We also handed down an oral summary of our reasons, indicating that full grounds would be furnished at a later date. We set out our full grounds below.

SALIENT BACKGROUND FACTS

[6] As stated at the outset, the appellant, Tee Siew Kai is the liquidator of Merger.

[7] Merger was the registered owner of 17 pieces of land in Mukim 17, Daerah Seberang Perai Tengah, Pulau Pinang ('the lands').

[8] On 29 September 1995, Merger entered into a joint venture agreement ('JVA') with Machang (in liquidation) to jointly develop and complete a light industrial estate project ('the project'). Pursuant to cl 6.1 of the JVA, any profit or any loss arising out of the project was to be shared by Merger and Machang in the ratio of 60:40.

[9] Merger appointed Machang as its attorney in respect of the lands vide an irrevocable power of attorney ('PA') dated 29 September 1995. Machang was also appointed project manager under a project management agreement ('PMA') executed on the same date namely 29 September 1995.

[10] In summary, the JVA, PA and PMA were all entered into on 29 September 1995.

[11] Ten years later, on 17 June 2002, Merger was wound up in the High Court in Penang pursuant to a winding up petition initiated by two petitioners.

[12] Seven years later, on 19 November 2009, Machang was also wound up and one Wong Weng Foo was appointed as its liquidator.

[13] Sometime prior to it being wound up, Machang had abandoned the project. The lands were however, by that stage, subdivided into individual lots.

[14] Pursuant to an order of court dated 28 August 2013, the liquidator, ie Tee Siew Kai was appointed as the liquidator of Merger, in substitution of the official receiver.

[15] As of the date of the liquidator's appointment in August 2013, the project undertaken by Machang had come to a halt. It had been abandoned sometime prior to Machang's liquidation in 2009. In other words the project had lain abandoned for some four years.

[16] It is an undisputed fact that in July 1999, Machang, utilising the PA, caused the lands to be charged to Bank Kerjasama Rakyat Malaysia ('Bank Rakyat') for project financing in the sum of RM10m, to develop the lands.

[17] As Merger was the registered owner of the lands, this amounted to a third party charge by Merger in favour of the bank, to enable financing to be granted to Machang.

[18] As the project failed and there was default in the repayment of the facilities, Bank Rakyat attempted on three occasions to sell the subject matter of the charge, namely, 124 unbuilt lots by way of auction. However all three attempts were unsuccessful (Bank Rakyat's final attempt was on 16 January 2014.)

[19] Therefore when the liquidator was appointed in August 2013, the status then prevailing was that there were 124 subdivided unbuilt individual parcels ('the 124 unbuilt lots'), which had yet to be sold and redeemed from Bank Kerjasama Rakyat Malaysia ('Bank Rakyat').

[20] As empowered under the order of court and the provisions of the Companies Act 1965, the liquidator, as agent for and on behalf of Merger, took into possession the 124 unbuilt lots which were yet to be sold and redeemed from Bank Rakyat. The purpose was to effect an expeditious sale of these units so as to realise these assets and distribute the proceeds for repayment of the secured creditor and utilisation of any balance for the benefit of Merger's unsecured creditors.

[21] On 29 April 2014, the liquidator took steps to advertise the 124 unbuilt lots for sale in various newspapers.

[22] On 12 May 2014, Merger received an offer from Kelana Estet Sdn Bhd ('Kelana Estet') to purchase the unbuilt lots for RM9m. On 16 May 2014 it received an expression of interest to purchase the unbuilt lots together with a 10% earnest deposit from Kelana Estet.

[23] On or around 13 June 2014, the liquidator procured a valuation report for the 124 unbuilt lots from Henry Butcher Malaysia (Seberang Perai) Sdn Bhd ('Henry Butcher'). Henry Butcher's report dated 5 July 2017 was prepared using the residual method of valuation. The report stated the market value for the unbuilt lots was RM9.5m while their forced sale value was RM6.65m.

[24] Machang subsequently procured a valuation report for the 124 unbuilt lots from Laurelcap Sdn Bhd ('Laurelcap'). In contrast, Laurelcap's report dated 1 December 2015 was prepared using the comparison method of valuation. The report stated that the market value of the unbuilt lots was RM16.5m, ie RM7m higher than the market value derived by Henry Butcher.

[25] On 24 June 2014, Merger was advised by Bank Rakyat that the redemption sum was RM8,247,996.05. The amount owed by Merger was RM1,493,256.50. The balance of the redemption sum was owed by Machang under the third party charge granted by Bank Rakyat to Machang. A

[26] On 17 July 2014 Merger accepted the offer of RM9m from Kelana Estet. Notwithstanding such offer, the liquidator, on behalf of Merger, could not execute the sale and purchase agreement by reason of Machang's insistence through its liquidator, one Wong, that Machang still enjoyed a valid contractual obligation under the joint venture agreement and the power of attorney. B C

[27] Wong asserted that any sale of the unbuilt lots to Kelana Estet, the intended purchaser, without Machang's consent would amount to a breach of the joint venture agreement and the power of attorney. Machang threatened to sue the liquidator personally for 'causing Merger to act in breach of the JVA and the power of attorney if he proceeded with the intended sale'. D

[28] The sale of the unbuilt lots to the intended purchaser, Kelana Estet was delayed. This resulted in Kelana Estet issuing a notice of demand to Merger on 5 January 2015. E

[29] On 8 January 2015, Bank Rakyat confirmed the redemption sum was RM8.6m and at Merger's request this sum was reduced by RM100,000 to RM8.5m. F

[30] On 23 February 2015, the liquidator, on behalf of Merger executed the sale and purchase agreement with Kelana Estet and its nominee Oasis Highland Sdn Bhd. The purchase price was RM9m. G

[31] On 26 March 2015 the redemption sum was settled in full. On 17 May 2016 Bank Rakyat refunded the sum of RM361,052.35 to Merger being the remaining sum available after deduction of the amount outstanding under Machang's account of RM1,707,957 and the redemption sum of RM6,792,043 for the facility afforded to Machang. H

[32] Accordingly on 3 August 2016, Merger demanded the sum of RM6,792,043 from Machang being the payment due from it under the financial facility for the redemption of the 124 unbuilt units. I

[33] Machang's primary grievance against the liquidator of Merger is the sale of the unbuilt lots as it contends that notwithstanding the winding up of first Merger, and seven years later Machang, the JVA and the PA survived the same.

Machang maintained that its consent was necessary to effect the sale. The liquidator, it was contended, had caused Merger to act in breach of the JVA and the irrevocable PA.

[34] Finally, it was alleged that the sale of the unbuilt lots had caused Machang to suffer loss and damage in the sum of RM3,300,801.58, such figure being derived from a theoretical computation of Machang's 40% share in the project. This computed figure is premised on a selling price of RM16.50m based on a valuation undertaken by the aforesaid Laurelcap for Machang, and a redemption sum of RM8,247,996.05.

[35] It was further contended that the sale at an undervalue had caused loss to the creditors of Merger in the sum of RM4,951,202.37, another theoretically computed figure stated to represent Merger's 60% share in the net proceeds, utilising the same redemption sum above.

[36] These figures were computed notwithstanding the fact that over a period of several years up to January 2014, Bank Rakyat as the secured creditor had been unable to effect any form of auction sale of the unbuilt lots, despite three attempts.

THE PROPOSED STATEMENT OF CLAIM

Alleged breaches of the JVA and the PA by Merger purportedly giving rise to liability of the liquidator

[37] In its application for leave to proceed against the liquidator in his personal capacity, Machang detailed at some considerable length the history of its relationship in relation to the JVA, PA and PMA from 1995 onwards. It serves no useful purpose to detail the 35 paragraphs drafted to this end.

[38] From *para 36* onwards the events ensuing from the appointment of the liquidator in August 2013 are set out in considerable detail. The heart of the proposed claim is at *paras 42 and 43* where it is claimed that:

(a) Merger allegedly *'disregarded and breached the JVA and the PA*'; and

(b) the liquidator is responsible for such breaches and is liable in damages personally.

[39] The breaches are attributed to Merger but the liquidator is alleged to be liable for the same personally.

[40] In *para 43* it is alleged that the liquidator *'had knowingly and wilfully caused Merger to commit the following unlawful acts for which the Defendant (ie*

the liquidator) is personally responsible and liable'. This is followed by a factual exposition of the entirety of events chronologically from the appointment of the liquidator up to the sale of the unbuilt lots. The pleadings do not identify specifically any act amongst the chronology as comprising unlawful and wrongful acts under the Companies Act 1965 or the common law.

[41] The thrust of the allegations appear to suggest that the liquidator acted in some manner 'unlawfully or wrongly' in proceeding with the sale of the unbuilt lots. The claim suggests that the liquidator is to be faulted for:

(a) not obtaining Machang's consent; and

(b) failing to acknowledge and accept that the JVA and the PA remained valid and binding. This allegation appears to be of primary importance.

[42] These allegations are made by Machang despite the fact that:

(a) the two companies had been wound up. This resulted in the cessation of the project management agreement and accordingly the PA and thereby the JVA;

(b) more significantly perhaps, Bank Rakyat, which afforded financing facilities to Machang, had invoked its remedies on default in relation to those facilities. The unbuilt lots comprised the subject matter of the third party charge (given by Merger). Bank Rakyat had initiated foreclosure proceedings in relation to the unbuilt lots, on the strength of this latter security;

(c) the security afforded by the third party charge clearly took precedence or priority over any form of alleged contractual obligation that could have subsisted (in itself unsustainable) between Machang and Merger;

(d) any such alleged breach, even if it subsisted, could only subsist as between the two companies in liquidation. Such breach cannot subsist between Machang and the liquidator of Merger, who is its agent and acts on its behalf. The claim is flawed in that it treats the liquidator as a separate and distinct entity, rather than as agent of the company. When the liquidator embarked upon the sale of the secured property, as Bank Rakyat had failed, he was merely carrying out his statutory duties under the Companies Act 1965. Such statutorily provided duties cannot amount to default or justify any attribution of liability vis a vis the liquidator; and

(e) the proposed statement of claim does not plead how the liquidator can become liable personally for the alleged breaches of contract by the company in liquidation, Merger. Neither could such liability, on the present facts, devolve in law upon the liquidator personally.

Alleged alternative cause of action in estoppel

[43] An alternative cause of action founded on estoppel against Merger resulting somehow in personal liability against the liquidator is then pleaded from *para 45* onwards. Estoppel is pleaded in respect of the alleged 'validity and subsistence of the JVA and the PA' notwithstanding the fact that both Merger and Machang had been wound up. In other words, the proposition being put forward was that:

(a) notwithstanding that the two entities had been wound up, clearly indicating their respective insolvencies;

(b) Bank Rakyat had called on the loans and was in the process of foreclosing on the unbuilt lots, which in any event comprised the subject matter of the third party charge and therefore took precedence or any contractual obligations between the parties;

(c) the JVA and PA allegedly remained in force and subsisting (such that the parties' respective obligations to complete the development presumably continued, notwithstanding the fact that they were insolvent and the bank had initiated recovery);

(d) the liquidator had sought to procure Machang's consent to the sale of the unbuilt lots but had not received such consent; and

(e) as such, Machang claimed that the liquidator was estopped from denying the ongoing validity and subsistence of the JVA and PA, as a consequence of which the unbuilt lands could not be sold. The liquidator was alleged to be personally liable in damages as a consequence of this estoppel.

Flaws and lack of merit in the proposed statement of claim

[44] It is clear from a perusal of the statement of claim filed by Machang that:

(a) the wrong party has been sued;

(b) there is no cause of action apparent on the face of the claim, notwithstanding its considerable length;

(c) the claim relies on proof of the subsistence of the JVA and PA before liability can even be claimed against Merger, let alone the liquidator. It is, in any event, an untenable proposition on the face of the claim; and

(d) the basis for the damages claimed is unfounded and there is no legal basis to attribute such liability to the liquidator.

[45] The claim does not meet the threshold requirements of inducing a breach of contract vis a vis the liquidator either. Any such claim would be

similarly unsustainable, as the liquidator merely carried out his primary duties of selling the assets of the company in liquidation in accordance with the statutory requirements of the Companies Act 1965 (see ss 236 and 237).

[46] By way of relief Machang sought declaratory relief to the effect that:

(a) the JVA and the PA are still valid, subsisting and operative; and

(b) that the liquidator is liable personally to pay Machang the sum of RM3,300,801.58, being Machang's entitlement to 40% share in the net proceeds of the sale of the 124 unbuilt lots (based on a selling price of RM16.5m as per the valuation by Laurelcap, plus the redemption sum of RM8,247,996.05 to redeem the unbuilt lots from Bank Rakyat).

[47] For the reasons we have stated in the course of the judgment such reliefs are unavailable on the facts of the present case. It is notable again, that the crux of the claim is centred on the alleged breach of agreements by Merger. As those alleged breaches are attributable to Merger, any claim should necessarily be against Merger and not the liquidator.

[48] The claim for damages against the liquidator is entirely theoretically computed with no reasonable bases to support it apart from a valuation report which cannot be said to be entirely independent.

THE DECISIONS OF THE COURTS BELOW

[49] As we alluded to earlier, the High Court allowed Machang's application and granted leave to proceed against the liquidator in person. On appeal by the liquidator, the Court of Appeal dismissed the appeal and affirmed the decision of the High Court. This in turn resulted in this court granting leave to appeal on 21 June 2018 on the sole question of law set out in para 4 above.

FINDINGS OF THE COURTS BELOW

The High Court

[50] In deciding to grant leave to Machang to commence proceedings against the liquidator in person, the High Court judge found that:

(a) the proposed writ of summons and statement of claim is directed against the liquidator personally. Thus, there is no merit in the contention that Machang has to file a proof of debt with Merger before it can sue the

liquidator;

(b) the application was filed under the inherent powers of the court, not under any provisions of the Companies Act 1965. Machang has the locus standi to file the application and the court has the inherent power to grant such leave;

(c) the liquidator is appointed by the court and as an officer of the court, leave is required before an action is commenced against him;

(d) the rationale for procuring leave is for the court to protect its officers from spurious or vexatious litigation and to uphold the integrity of the winding up process to ensure there is no wrongful interference with the process (see *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501); and

(e) based on the opposing views taken by the liquidator on the issue of the JVA and the irrevocable PA, there is a necessity for the dispute between the parties to be litigated in a civil court.

The Court of Appeal

[51] The Court of Appeal held that this was not a fit and proper case in which to intervene as it was a matter requiring an exercise of the discretion of the High Court. Accordingly it dismissed the appeal.

[52] It should be said that the liquidator was aggrieved by the following statement made in the course of dismissing the appeal:

> [17] In the instant case, there are serious allegations as well as affidavit evidence to demonstrate the liquidator has prima facie and/or on the face of record had compromised with the jurisprudence relating to accountability, transparency and good governance. These are benchmarks which is now imposed by the international community on all transactions and professionals are expected to live to the expectation of their calling. Liquidators being professionals cannot shield themselves from being sued based on old common law cases. For example, what was seen in medical negligence cases which more or less gave wide protection to doctors under the Bolam principle has been slowly whittled down to near zero by development of case laws ...

[53] The Court of Appeal in declining to refer to the submissions on the merits of the dispute between the parties, reminded itself that 'the appeal is related to leave to sue only'.

ANALYSIS OF THE SUBMISSIONS BEFORE THE FEDERAL COURT

Liquidator's submissions

[54] In prosecuting the appeal, counsel for the liquidator submitted that the JVA and the project management agreement ie the PMA provided that:

(a) the JVA and PMA were to be executed simultaneously. The net effect was that Machang became the Project Manager;

(b) the PA was also to be executed simultaneously;

(c) the two agreements and the PA were executed simultaneously on 29 September 1995;

(d) accordingly the entire agreement between the parties comprised the JVA, the PMA and the PA. They could not be construed in isolation;

(e) the PMA provides that it ceases or determines in the event that either of the parties are wound up. Accordingly the termination of not only Merger, but also Machang ceased on the winding up of Merger on 17 June 2002 at the earliest, and by the very latest on the winding up of Machang on 19 November 2009; and

(f) as the JVA, PMA and PA are inextricably intertwined and must be read harmoniously and together, it is not tenable for the JVA and PA to subsist when the PMA stands terminated.

[55] Counsel for the liquidator contended secondly that as Machang was neither a creditor nor contributory of Merger, it did not have the requisite locus standi to seek leave to sue the liquidator in his personal capacity. The provisions of the Companies Act 1965 allow for creditors and contributories to seek recourse against the liquidator as his acts and/or omissions affect them.

[56] In the instant case the relief sought by Machang related primarily to an alleged breach of the JVA and PA which was not available against the liquidator personally, but against Merger.

Machang's submissions

[57] In urging us to maintain the concurrent decisions of the courts below, Machang submitted, inter alia, that any entity, whether a creditor or contributory, who is affected by the wrongful acts of a liquidator, whether personal action or inaction, is entitled to sue that liquidator. The liquidator in this case is a court-appointed liquidator and therefore leave of court is required to sue him.

[58] Machang submitted that the court is vested with inherent jurisdiction to allow leave notwithstanding the fact that Machang is neither a creditor nor

a contributory. Leave ought to be granted pursuant to the inherent jurisdiction of the court as long as Machang satisfied the threshold of a prima facie case.

[59] Machang further defended the appeal by submitting that the liquidator did not act in the best interests of the creditors, as he had not called a creditor's meeting to inform the creditors of the sale of the properties. On this basis it was concluded that the unbuilt lots were sold at a gross undervalue.

[60] The fact that the liquidator did not comply with Machang's request for the list of creditors of Merger so that those creditors could be informed of Machang's application, led to the irresistible conclusion that the sale of the unbuilt lots had impacted the creditors and contributories of Merger Acceptance.

OUR ANALYSIS AND DECISION IN SUMMARY

[61] On the facts of the instant appeal the primary issue that arises for consideration is this:

> As set out in the first question of law, does Machang, that is neither a creditor nor a contributory of Merger, have the locus standi to seek leave to initiate an action against the liquidator of Merger personally, for losses alleged to be suffered by Machang as a consequence of an alleged breach of the agreements entered into between Machang and Merger?

[62] In other words, where two parties have entered into a series of contracts and one of the parties is alleged to have breached these contracts, should:

(a) the defaulting party be sued and held liable for such breach; or

(b) if the party alleged to be in default is in liquidation, should its liquidator be sued in person instead, and made personally liable for any damages alleged to have been occasioned?

[63] The liquidator's office is a statutory one, although the position has become imbued over time and case law, with features that do not fall within the four corners of the office. The liquidator has custody and control of all of the assets of the company in liquidation, and is an agent of the company (see *Knowles v Scott* [1891] 1 Ch 717 at p 723 per Romer J as cited in the *Law and Practice of Corporate Insolvency* in Malaysia by Sweet & Maxwell).

[64] As an agent of the company in liquidation, the acts of the liquidator are binding on the company. But the liquidator is not personally liable for those acts that he carries out in his capacity as liquidator, even though his principal, the company, may be liable: see *Mahomed and another v Morris and others* [2000] 2 BCLC 536 at p 556. In the instant case, that means that when

the liquidator carried out his statutorily stipulated function of selling the lands, he did so on behalf of the company, in his capacity as agent of the company. As such, while the sale so effected is binding on the company, it is not and does not amount to an act by the liquidator personally. The consequence is that a third party, such as Merger cannot sue the liquidator for negligence, save for misfeasance or personal misconduct on his part (see again *Knowles v Scott* (above); *Re Berkeley Applegate (Investment Consultants) Ltd, Harris v Conway* [1988] 3 WLR 95, and generally *The Law of Corporate Insolvency in Malaysia* — Chapter 11 at para 11.005).

[65] One of the principal objectives in liquidation is for the liquidator to expeditiously secure the sale of the assets of the company so as to generate funds to enable payment to be made to creditors. Therefore, in executing the sale of the lands, the liquidator was carrying out his most basic function. Having taken control of the company's assets on appointment, the liquidator's function is to apply those assets towards payment of the company's liabilities. In other words, utilising the assets in so far as they are capable of monetary value, in satisfaction of creditor's debts, and in the event of a surplus to its members. To this extent, the liquidator owed no duties to Machang, which was neither a creditor nor contributory of Merger.

[66] This overview of a liquidator's functions is comprehensively set out in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 where it was held that upon the making of a winding up order:

(a) first, the custody and control of all property and choses in action are transferred from the directors to the liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme provided by legislation;

(b) the duty under statute of the liquidator is to collect the assets of the company and apply them in the discharge of the company's liabilities; such surplus as subsists is to be distributed amongst the members; and

(c) all powers of dealing with the company's assets are exercisable by the liquidator for the benefit of those who are entitled to share in the proceeds of realisation of the assets under the statutory scheme. As the company is distinct from its members it cannot share in these proceeds and upon completion of winding up will be dissolved.

[67] It is pertinent at this juncture to refer to s 236 of the Companies Act 1965 which sets out the powers of the liquidator. Under para 236(2)(c) of the same, the liquidator is empowered to sell immovable property of the company in liquidation via private contract. It is clear from the foregoing that the liquidator here was simply carrying out his duties in accordance with statute. Therefore the liquidator cannot be alleged to have abused his office, nor

committed misfeasance by selling the lands.

[68] By way of analogy, there is the case of *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 where the Privy Council was confronted with the issue of whether the appellants, who were neither creditors nor contributories, had standing to invoke the statutory jurisdiction of the court to remove the respondents as liquidators of the company. In that case the Privy Council had to decide on the proper interpretation to be given to s 106 of the Companies Law (1995) Revision which is based upon the English Companies Act 1862. Under s 106(1):

> Any official liquidator may resign or be removed by the Court on due cause shown; and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court.

The Privy Council agreed that while there is no express restriction on the category of person who may make the application, the courts had consistently treated creditors and contributories as the proper persons to make the application for the removal of a liquidator as they were the only persons interested in the liquidation. Furthermore, the Privy Council highlighted that where the court is asked to exercise a statutory power or its inherent jurisdiction (as in the present appeal), it is incumbent on the court to consider not only the whether it has *jurisdiction* to make the order but whether the applicant is a *proper person* to invoke the jurisdiction. This meant, according to the Privy Council, that the applicant must have a *legitimate interest in the relief sought*. Thus, the standing of an applicant cannot be considered separately without regard to the nature of the relief for which the application is made. Thus in *Deloitte* it was held that the only persons who could have any legitimate interest in removing the liquidators are the *persons entitled to participate in the ultimate distribution of the company's assets, ie the creditors and not the applicants who were strangers to the liquidation and had interests adverse to the liquidation and the interests of the creditors*. Thus notwithstanding the wide breadth of section 106(1), the Privy Council refused to allow a person other than a creditor or a contributory standing to apply for the removal of a liquidator. Although the Privy Council in *Deloitte* was dealing with an application for the removal of a liquidator by a party who was neither creditor nor contributory, we see no good reason why we should not adopt the reasoning enunciated there for the purposes of the present appeal.

[69] In our view, any allegation of selling at an undervalue, even if true, is available only to a creditor or contributory. The liquidator owed no duty of care to Machang in this context. Machang has no basis to so allege because it is not a creditor of Merger.

[70] It is important to comprehend, as we have set out before, that Machang's primary complaint of an alleged breach of contract is against Merger, as the other contracting party. Any remedy that Machang seeks to obtain must necessarily be procured from the company, ie Merger. However, such a remedy can only arise if Machang is able to prove liability on the part of

Merger, qua company. In other words, Machang enjoys, at its highest, a contingent claim against the company, Merger. It is only if it succeeds in its contingent claim premised on an alleged breach of contract, that it can seek damages against Merger.

[71] How does such a contingent claim against Merger for damages premised on an alleged breach of contract by Merger, enable Machang to bring an action against the liquidator in his personal capacity? How does it give rise to a cause of action against the liquidator in his personal capacity?

[72] It is evident that in seeking to obtain leave to proceed against the liquidator personally, Machang seeks to initiate an action against the wrong party.

THE ERRORS IN THE JUDGMENT OF THE HIGH COURT

[73] The High Court failed to comprehend this distinction and therefore erred in granting leave to proceed. A perusal of the judgment of that court discloses the following errors of law:

(a) in determining that Machang had the requisite locus standi to obtain leave to proceed against the liquidator personally, the judge failed to comprehend that:

(i) a third party, such as Machang lacks the capacity to bring an action against a liquidator personally for an allegation of a breach of contract by the company in liquidation;

(ii) a claim in damages for an alleged breach of contract by Merger, lay against the company and not against the liquidator in his personal capacity;

(iii) as the claim for damages lay against Merger, a proof of debt claim ought to have been filed in the winding up;

(iv) Merger had no basis in law to seek to initiate an action against the liquidator personally under the inherent jurisdiction of the court, when the Companies Act 1965 provides sufficient statutory remedies for any alleged acts of misconduct or misfeasance by the liquidator. The judge erred in citing *Chin Cheen Foh v Ong Tee Chew* [2003] 3 MLJ 57; [2003] 2 CLJ 575 for the proposition that an application for leave to proceed against a liquidator personally was to be brought pursuant to the inherent jurisdiction of the court. When one peruses the judgment of Abdul Malik Ishak J in the said case, it will be noted that His Lordship's obiter dictum in relation to the court's inherent jurisdiction arose for discussion due to the defendant relying on the said power in support of its

application to strike out the plaintiff's statement of claim. It is noted that His Lordship referred to the Court of Appeal case of *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204; [1995] 4 CLJ 11 as being on all fours with *Chin Cheen Foh v Ong Tee Chew*, and in the Court of Appeal, Abu Mansor JCA held that according to s 236(3) of the Companies Act 1965 (Act 125) (Revised 1973), a liquidator appointed by the court is considered as an officer of the court and leave of court is needed before an action can be commenced against him. The Court of Appeal in *Chi Liung Holdings* nowhere stated that an application for leave to commence an action against a liquidator in person should be made pursuant to the court's inherent jurisdiction, neither did the High Court *Chin Cheen Foh v Ong Tee Chew*;

(v) there was no basis for any allegations of misfeasance or personal misconduct to be levelled against the liquidator as he was carrying out his primary statutory duty in selling the lands; and

(vi) any allegations of negligence on the part of the liquidator, such as a sale at an undervalue, could only be brought by persons affected by such a sale, namely creditors and contributories, not Machang.

(b) having failed to recognise the distinction between a contingent cause of action against the company in liquidation and the liquidator personally, the judge further erred in his consideration of whether there was any sufficient basis in fact or law in the circumstances of the instant appeal to bring such an action.

[74] This brings into focus the secondary issue of when and how leave ought to be granted to proceed against a court appointed liquidator personally.

[75] It is apt at this juncture to consider the role of the winding up court in a liquidation. For this we turn to the case of *Vernon Lloyd-Owen v Alfred E Bull & Ors* [1936] 1 DLR 433 where the Privy Council observed that:

> A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their *probable success*: where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.

[76] The underlying rationale behind requiring prior leave of court is to avoid wasteful litigation being conducted against liquidators and the like and to preclude unwarranted and wrongful interference with the winding up

process: *Chi Liung Holdings* at pp 209–210 (MLJ); p 17 (CLJ) and *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547 at para [7]. A

[77] The 'probable success' test mentioned above has been further refined by this court in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501. There this court undertook a consideration of the factual matrix of the case before concluding that no prima facie case had been made out. It was held that in order to succeed in an application for the grant of leave the party seeking such leave must make out a prima facie case (citing, inter alia, *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571 at p 581; [2007] 7 CLJ 516 at p 532, *TN Metal Industries Sdn Bhd v Ng Pyak Yeow* [1995] 1 LNS 320, and *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584). B C D

[78] More significantly, this court held that in applying the test of whether a prima facie case was made out, the court is compelled to evaluate the evidence led to determine whether such test is in fact met (see *Mamone and Another v Pantzer* (2001) 36 ACSR 743 where it was held that the claim has to have sufficient merit). E

[79] It was also held that pecuniary loss suffered by the company in liquidation ought to be shown (citing *Abric*). F

[80] The judge in the High Court went through the law in detail in the course of his judgment so as to underscore the position in law as set out above. He then went on to set out the reliefs sought against the liquidator and the response of the liquidator by simply reproducing large portions of his affidavit. The judge then concluded that based on the competing positions adopted by the parties ie Machang and the liquidator there was a need for the 'contentious issues and disputes to be ventilated and litigated' by way of a civil suit against the liquidator personally. G

[81] However, in arriving at this conclusion, nowhere did the judge undertake any form of analysis of the basis or nature of the claim. By failing to do so, he did not appreciate that the claim, when bared to its essence, amounted to a claim by a third party with no locus standi, for a breach of contract, more properly levelled against the company in liquidation, rather than the liquidator. In short, there was simply no merit in the claim brought, because it was brought against the wrong party and was therefore devoid of merit. The essential ingredients of the claim were simply not present. H I

THE COURT OF APPEAL

[82] The Court of Appeal erred in simply affirming the decision of the High Court on the basis that such decision was simply an exercise of discretion by the judge which ought not to be interfered with lightly. In adopting this approach, the Court of Appeal failed to recognise or put right the fundamental errors in the approach adopted by the High Court which we have outlined at some length above. In summary:

(a) firstly the Court of Appeal erred in failing to consider or address the issue of the locus standi of Machang to bring such an action against the liquidator personally;

(b) more significantly, the Court of Appeal went on to extend the liability of liquidators personally in negligence by allowing for such claims to be brought by any 'interested parties in the winding-up process'. Such a broad and undefined extension of personal liability is unjustified as the Court of Appeal neglected or failed to provide any legal reasoning to substantiate it. It is trite that any extension of liability in such a carefully circumscribed area of the law requires incremental extensions on legally coherent grounds;

(c) the Court of Appeal failed to review the factual basis for the allegation of liability, and to that extent, fell into the same error as the High Court. As such it failed to recognise that Machang was seeking to bring a contingent claim for damages premised on an alleged breach of contract against the liquidator, when it ought properly, if at all, to have been brought against Merger; and

(d) in these circumstances the Court of Appeal was misguided, and had no basis in law or in fact to state that the liquidator '... had, prima facie, or on the face of the record compromised with the jurisprudence relating to accountability, transparency and good governance. These are benchmarks which is now imposed by the international community on all transactions and professionals are expected to live to the expectation of their calling. Liquidators being professionals cannot shield themselves from being sued based on old common law cases ...'.

CONCLUSION

[83] For the reasons set out above we determined that the appeal ought to be allowed and the question of law answered in the negative.

[84] The appeal was therefore allowed with costs of RM40,000 to the appellant (the liquidator), subject to allocatur.

Appeal allowed with costs of RM40,000 to appellant subject to allocatur.

Reported by Dzulqarnain Ab Fatar